Supreme Court, U.S.
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No. 06-887

IN THE

Supreme Court of the United States

CITY OF REVERE, ET AL.,

Petitioners,

v.

T&D VIDEO, INC., D/B/A MOONLITE READER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: April 27, 2007

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW

1. Is there any analytic distinction between a court's refusal to award attorney's fees under 42 U.S.C. § 1988 because the fee request is so high as to "shock the conscience" and a refusal to award fees because the request is "outrageously excessive," or "grossly or intolerably inflated," or "manifestly filed in bad faith"? Or is the distinction merely semantic?

2(a). Does a complete ban on adult video stores constitute a time, place, manner restriction?

2(b). May a municipality condition the right to sell non-obscene adult videos on the sale of non-adult videos?

2(c). Is a ban on adult video stores narrowly tailored to curtail the secondary effects of adult entertainment where no other methods of reducing secondary effects have been previously attempted?

2(d). Is a ban on adult video stores justified as a compelling interest in curbing the secondary effects of adult entertainment where the legislative record evidences no investigation or findings of fact regarding secondary effects?

CORPORATE DISCLOSURE STATEMENT

T&D Video, Inc. d/b/a Moonlite Reader is a privately held Massachusetts corporation. Thaddeus Drabkowski and Del Paone are the shareholders.

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MUNICIPAL ZONING ORDINANCES INVOLVED

Revere Zoning Ordinance §§ 17.08.65 through 17.08.069 and § 17.16.045, the provisions at issue in this case, as enacted in 1993, are set forth at Appendix A. These provisions, as amended in 1995, are forth at Appendix B.

STATEMENT OF THE CASE

On September 14, 1993, the principals of T&D Video, Inc., an adult book and video store doing business as "Moonlite Reader" ("T&D"), sought a business certificate from The Revere City Clerk. Petition at 2a. The City Clerk asked one of the principals to sign an "agreement" stating that the business would not rent adult videos, but he refused. *Id.* The City Clerk issued the business certificate anyway. *Id.*

Having learned that T&D intended to open an adult video store, Revere's City Councilors expressed to the Building Inspector, Joseph Ferruzzi, "their concern that there was an adult video store [that was] going to be located in Revere" and asked him "not to allow it." *See* App. at 13a-14a (Ferruzzi confirming that his deposition testimony in this regard is accurate). Ferruzzi told the Councilors that such use was not prohibited by Revere's existing ordinance and that he could not prohibit an adult video store. *Id.* at 15a. In response, the City Councilors stated that "[t]hey would get together with the City Planner and draft one." *Id.* at 16a.

Soon thereafter, Revere's City Planner, Frank Stringi, set about drafting the ordinance. Stringi focused the ordinance on adult content, treating all types of adult entertainment, whether live nude

dancing or video rentals, the same. Stringi testified at trial, "I don't differentiate between a lounge and a video store. They still sell the same material, and that's sexually related." *Id.* at 21a. Stringi further testified that he was unaware at the time that three video stores in Revere already included adult titles in their selection; was unaware that these stores were within 200 feet of residences; and that he had never detected increased crime around these three stores. *Id.* at 17a-18a, 23a-24a. At the time of drafting, Stringi had not "put his hands" on any documentation of his view that adult video stores would have the same deleterious effect on the community as the Squire Lounge, a nude dance entertainment establishment in Revere. *Id.* at 21a-22a. Rather, Stringi was guided by his own personal views, including a belief that people who rent adult videos contribute to prostitution. *Id.* at 23a.

Two days after T&D requested a business certificate, on September 16, 1993, Revere's Mayor submitted to the City Council an "adult entertainment" amendment to Revere's zoning ordinance, which placed numerous restrictions on the location, size, and setbacks of lots containing adult uses. *See* App. E. Former City Councilor Richard Penn testified at the trial that he did not recall the Council considering any documents relating to the secondary effects of adult entertainment in Revere at the time it enacted the ordinance. *See* App. 27a-28a. Nor, Penn testified, did the Council request an investigation of these purported secondary effects. *Id.* at 28a-29a. Penn did not even discuss the ordinance with its drafter, Mr. Stringi, before voting on it. *Id.* at 29a. Similarly, former City Councilor John Arigo testified that his only conversation with Stringi about the law on which the ordinance was based, the Peabody, Massachusetts zoning ordinance, related to the fact that it had been passed. *See id.* at 32a.

On November 8, 1993, the City Council adopted the amendment as §§ 17.08.065 through 17.08.069, and § 17.16.045, of the Revere zoning ordinance (hereinafter, these provisions are referred to as the "Ordinance"). *See* App. A.[1]

In August 1994, having completed its renovations, T&D sought a sign permit for the store. Petition at 4a-5a. Revere's Building Inspector, Mr. Ferruzzi, denied T&D's application, stating that T&D could not operate its store without violating the Ordinance. *Id.* at 5a. After appealing unsuccessfully to Revere's zoning board of appeals, *id.*, T&D promptly filed suit and moved for a preliminary injunction enjoining enforcement of the Ordinance. T&D brought claims under the First Amendment and Article 16 of the Massachusetts Declaration of Rights. *Id.* at 29a-30a.[2]

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[1] In its Petition, Revere neglects to include the Ordinance in the appendix, despite the fact that its Petition is based in part on the alleged constitutionality of the Ordinance. This omission is in violation of the Court's rules. *See* Sup. Ct. Rule 14.1(f) (requiring inclusion of the "ordinances . . . involved in the case" in the text of the Petition, or if the ordinance is lengthy, in excerpt form in the appendix).

[2] While the Massachusetts Appeals Court (the "Appeals Court") rested the decision below on the First Amendment, the Massachusetts Supreme Judicial Court has indicated that the protections afforded speech by Article 16 are broader than those afforded by the First Amendment. *See Commonwealth v. Sees*, 374 Mass. 532, 536-37 (1978) (holding that Article 16 protected nude dancing that might have been proscribed under the First Amendment); *see also Opinion of the Justices to the House of Representatives*, 349 Mass. 786, 792-793 (1965) (opining on legality of proposed law under Article 16, but not the First Amendment, apparently because law could be invalid under former but constitutional under latter).

After extensive briefing and a hearing, the trial court preliminarily enjoined enforcement of the Ordinance, noting the high likelihood that it imposed an unconstitutional restraint on speech. *T&D Video, Inc. v. City of Revere*, 3 Mass. L. Rptr. 427 (1994). The Massachusetts Supreme Judicial Court affirmed entry of the preliminary injunction in *T&D Video, Inc. v. City of Revere*, 423 Mass. 577 (1996).

Revere, meanwhile, had apparently realized that the interplay of setback and lot size restrictions in the Ordinance made it geometrically impossible to open an adult use *anywhere* in Revere. Petition at 4a. On May 1, 1995, Revere amended the Ordinance to reduce the setback requirements and expand the range of allowable lot sizes. *See* App. B.

Following affirmance of the preliminary injunction, extensive discovery ensued from 1996 to 1999, including T&D's deposing members of the Revere City Council. After T&D's motion for summary judgment was denied, a bench trial was held in August 2002. Two experts on land use testified on T&D's behalf that the Ordinance foreclosed virtually all locations for an adult video store to operate in Revere. Petition at 7a. Revere's city planner, Mr. Stringi, testified to dispute this testimony. *See, e.g.*, App. D. The trial court issued its ruling on October 23, 2002, holding that the Ordinance violated the First Amendment because it left inadequate alternative avenues of communication. Petition at 6a-10a. Specifically, the trial court credited T&D's experts' testimony that the Ordinance limited adult uses to a single location in Revere: a contaminated oil tank farm that was patently unsuitable for operation of a retail store. *Id.* at 7a. Defendants were permanently enjoined from enforcing the Ordinance. *Id.* at 10a.

Additionally — in language that Revere inexplicably redacted from the copy of the decision reproduced in the appendix to its Petition — the trial court held that Revere had "directed the Ordinance specifically at T&D." *See* App. H for an unredacted copy of ¶ 3 of the trial court's Conclusions of Law.[3]

T&D filed a petition for attorney's fees and costs on January 16, 2003. After briefing and a hearing at which two expert witnesses testified on behalf of T&D and were cross-examined, on February 9, 2004 the trial court ruled that T&D was entitled to $915,027 in reasonable attorney's fees, expert fees, and costs. *See* Petition at 12a-25a. In his decision, the trial judge found it "patently obvious" that

> Revere was never interested in resolving this case through settlement or alternative dispute resolution, and that this attitude, politically engendered, obtained long after it was apparent that its actions in framing and attempting to enforce unconstitutional zoning regulations enacted for the sole purpose of 'zoning out' T&D Videos [*sic*] proposed use of its premises as an adult entertainment video and bookstore, were patently illegal.

Id. at 22a-23a.

Revere appealed, but the Appeals Court affirmed the holding that the Ordinance was unconstitutional and entry of the permanent

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[3] This Court's Rule 14.1(h) does not permit a party to submit *excerpts* of the relevant opinions below. The Court can hardly determine whether a particular decision merits a writ of certiorari when portions of that decision have been selectively excised.

injunction. *See id.* at 26a-53a. The Appeals Court held that there was ample evidence to support the trial court's finding that the Ordinance left only one, unsuitable location for an adult use to locate in Revere, and that this was inadequate under the Court's "time, place, manner" jurisprudence. *Id.* at 38a-40a.

With respect to the fee award, the Appeals Court rejected Revere's argument that T&D's initial request for attorney's fees was so high that T&D, as a penalty, should receive no fees. Analyzing the issue, the Appeals Court held that

> [a] judge may deny in its entirety a request for an award of fees only if the amount that the prevailing party requests is so 'unreasonable' and exorbitant that it 'shocks the conscience,' or if counsel makes no good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.

Id. at 42a. As authority for this proposition, the Appeals Court cited decisions from the First, Fourth, Fifth, and Seventh Circuit Courts of Appeals. *Id.* While the court found that T&D's fee request did not meet this standard, it did find that the $915,027 in fees awarded was too high and remanded this issue to the trial court. *Id.* at 43a-53a.

Revere subsequently applied to the Massachusetts Supreme Judicial Court for further appellate review, but that court denied Revere's application by order dated September 28, 2006. *Id.* at 58a.

REASONS FOR DENYING THE WRIT

The Petition raises no substantial issues. In the proceedings below, Revere failed to raise its argument regarding the purported "circuit split" as to the standard for denying fees requested under § 1988. The issue is chimerical, in any event. All of the courts that Revere mentions in its Petition exercise their discretion to deny fees when they consider the fee request grossly excessive. The fact that they use synonymous, but not identical, phrases to describe this excessiveness is of no significance. Indeed, the cases Revere describes as on opposite sides of a "circuit split" cite to one another as authority. Revere's argument is frivolous.

Revere's First Amendment arguments are, if anything, even less compelling. This Court has never suggested that a complete ban on adult video stores is permissible under its time, place, manner jurisprudence. Revere's content-based ban, though masquerading as a zoning law, must be reviewed under the strict scrutiny standard. Strict scrutiny is also required because the Ordinance is effectively a means of compelling speech (the sale of non-adult videos). The Ordinance fails the strict scrutiny standard on several grounds. The Ordinance was unjustified because the legislative record is devoid of any indication that Revere considered the secondary effects of adult entertainment. A complete ban could not be narrowly tailored to any governmental interest because less drastic methods of regulating secondary effects were available but never even attempted. Finally, the trial court's undisputed finding that Revere passed its Ordinance to single out T&D must doom the law.

I. THERE IS NO CIRCUIT SPLIT REGARDING THE STANDARD FOR DENYING A FEE REQUEST MADE UNDER 42 U.S.C. § 1988

Revere's claim that a "circuit split" exists between courts that have used the phrase "shocks the conscience" in assessing whether to deny an attorney's fee request made under § 1988, and courts that have used other language, is without merit. It is a transparent attempt to create a disputed legal issue where none exists. Perhaps the best evidence that Revere has manufactured the argument for this Petition is the fact that it failed to raise it in the proceedings below.

Revere was entirely silent on this issue in the Appeals Court, even though the trial court cited to the "shocks the conscience" standard in its fee award. *See* Petition at 17a. In its brief to the Appeals Court, Revere simply argued that the trial court had reached the wrong result, not that it had applied the wrong standard. *See* App. I. Similarly, in its application to the Massachusetts Supreme Judicial Court for further appellate review, Revere never took issue with the "shocks the conscience" standard employed by the Appeals Court. *See* App. J. To the contrary, Revere embraced that standard, lamenting that "the conscience of the Appeals Court needs sharpening." App. at 45a. Both Revere's Appeals Court brief and its application for further appellate review cite *Fair Hous. Council of Greater Wash. v. Landow*, 999 F.2d 92 (1993), a Fourth Circuit case that Revere thought good law as of last fall but now claims was erroneously decided. While Revere argues in its Petition that the Appeals Court and the Fourth Circuit are aligned on the wrong side of a "circuit split," in the courts below it argued that the trial court and Appeals Court had disregarded the teachings of *Landow*, a case that it cited among the decisions of the other circuits. *See*

App. at 41a; ("Notwithstanding the admonition of the First, Fourth, Fifth and Seventh Circuits, T&D, in this case, submitted a grossly bloated, outrageously excessive request for fees and costs."); App. at 48a (same).

It is little wonder that Revere disregarded this Court's Rule 14.1(g)(i) and failed to set forth in the Petition the manner in which it preserved this federal question in the proceedings below. Not only did Revere fail to raise the question, it took a position in those proceedings completely opposite of the one it has adopted for this Petition.

Even had Revere not waived its right to raise the issue of whether the "shocks the conscience" standard is correct, its argument is utterly unpersuasive and raises no serious issues requiring the Court's consideration. Revere now argues that the "shocks the conscience" language employed by the Appeals Court and the Fourth Circuit is "too onerous, does not conform with the spirit of prior decisions of this Court, and conflicts with decisions of other federal courts of appeal considering the issue." Petition at 8. Specifically, Revere claims that the "shocks the conscience" standard used by the Appeals Court below and by the Fourth Circuit in *Landow*, is more stringent than, and in "conflict" with, the standards set forth in *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980), and *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991). *Id.* at 9-10.

The argument is baseless. To simply read the decisions of the Appeals Court and the Fourth Circuit is to see through Revere's argument. In the decision below, the Appeals Court not only considered *Landow* in assessing T&D's attorney's fee request, but also considered *and cited to Stackler* and *Kendrick*. *See* Petition at 43a (citing *Stackler*, 612 F.2d at 1059;

Kendrick, 944 F.2d at 958; *Landow*, 999 F.2d at 96; *Scham v. District Cts. Trying Criminal Cases*, 148 F.3d 554, 558 (5th Cir. 1998)). The Appeals Court clearly understood that the foregoing authorities all set forth the same general standard for denial of fees under § 1988.

Similarly, in *Landow*, the Fourth Circuit held that district courts could deny attorney's fees outright when the request was "so excessive it shocks the conscience of the court." *Id.* at 97. As authority for this proposition the *Landow* court cited *Stackler* and *Kendrick* with approval and wrote, "we *join* the First and Seventh Circuits in recognizing discretion in the district courts to deny a fee request in its entirety in civil rights litigation when the amount requested is so excessive it shocks the conscience of the court." *Landow*, 999 F.2d at 97 (emphasis added).

If there is a circuit split here, it is a peculiar one where all of the involved circuits believe themselves to be in harmony.

All of the other decisions that Revere suggests are also in "conflict" with the Appeals Court and the Fourth Circuit reveal no such conflict. Rather, they reveal the unremarkable fact that different courts sometimes use different words when describing what constitutes an exorbitant fee request. In its Petition, Revere cites four different phrases that circuit courts have employed in the course of considering § 1988 fee requests: the Seventh Circuit may deny "intolerably inflated" fee applications; the D.C. Circuit may deny fee applications that are "manifestly inadequate, 'grossly and intolerably exaggerated, or manifestly filed in bad faith'"; alternatively, the D.C. circuit may deny fee applications that are "outrageously unreasonable"; and the Tenth Circuit may deny a fee application that is "outrageously excessive." *See*

Petition at 9-10 (citations omitted). For reasons which are left unstated, Revere concludes that the varying phrases used by these different circuits are consistent with one another, and with *Kendrick*, but inconsistent with the language employed by the Fourth Circuit and the Appeals Court. *Id.*

It is clear, however, that while each circuit has articulated the standard differently, these semantic differences do not alter the meaning of the standard. The decisions indicate that, in spite of the courts' different phrasing, their standards are all designed to test the same thing: whether an award would encourage plaintiffs' attorneys to make unreasonable demands. In *Stackler*, the Seventh Circuit explained that an outright denial of fees is appropriate when the denial will prevent attorneys from making unreasonable demands without consequences:

> If, as appellant argues, the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place. To discourage such greed a severer reaction is needful, and the District Court responded appropriately in the case at bar.

612 F.2d at 1059.

Other courts of appeal subsequently followed the Seventh Circuit's lead and denied attorney's fees applications outright where an award of attorney's fees would have encouraged unreasonable fee

applications. *See Envtl. Def. Fund v. Reilly*, 1 F.3d 1254, 1258 (D.C. Cir. 1993) (citing *Stackler* with approval and holding that it can deny an outrageously unreasonable fee request in its entirety to prevent plaintiff's attorneys from feeling free to make unreasonable demands); *see also Kendrick*, 944 F.2d at 958 (citing *Stackler* with approval and declaring that an outright denial of fees "is strong medicine, but for this blow-up of a routine [civil rights matter], and inexcusable reaching for fees — to the burden of the court — we believe it entirely appropriate."); *Landow*, 999 F.2d at 97 (citing *Stackler* with approval and "telegraph[ing] a signal to attorneys . . . to act responsibly when submitting petitions for attorneys' fees.").

Contrary to Revere's suggestion, the Fourth Circuit's "shocks the conscience" standard does indeed follow the spirit of this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." (citation omitted). As several circuits have noted, in consideration of *Hensley* and the Congressional intent behind § 1988, an outright denial of fees is a severe sanction that is reserved only for fee requests that clearly abuse the judicial process. *See Zabkowicz v. W. Bend Co.*, 789 F.2d 540, 550 (7th Cir. 1986) (considering *Hensley's* holding that Title VII Plaintiffs should be awarded attorney's fees absent special circumstances and recognizing that wholesale denial of attorney's fees requests "is a stringent sanction, to be reserved for only the most severe of situations, and appropriately invoked only in very limited circumstances.") (citations and internal quotation marks omitted); *Budget Rent-A-Car Sys., Inc. v. Consol. Equity, LLC*, 428 F.3d 717, 718 (7th Cir. 2005) ("[D]enial is an appropriate sanction for requesting an award that is not merely

excessive, but so exorbitant as to constitute an abuse of the process of the court asked to make the award."); *see also Jordan v. United States Dep't of Justice*, 691 F.2d 514, 518 (D.C. Cir. 1982)(describing a total denial of a fee request as a "purely prophylactic measure").[4] The Fourth Circuit's "shocks the conscience" standard is certainly in the spirit of the Congressional intent and the case law interpreting § 1988.

Finally, even assuming there was a conflict between the circuits' standards, review of the Appeals Court's decision would not be an appropriate exercise of this Court's powers. Under any circuit's standard, an outright denial of attorney's fees is a matter of discretion. *See Budget Rent-A-Car*, 428 F.3d at 718 (recognizing that under *Stackler*, the District Court *may* order an outright denial of attorney's fees, whereas if sanctions are sought under Fed. R. Civ. P. 11, the District Court *shall* order outright denial of attorney's fees in certain circumstances); *Landow*, 999 F.2d at 96 ("A district court *may, in its discretion*, deny a request for attorneys' fees in its entirety when the request, submitted pursuant to 42 U.S.C. § 1988, is so outrageously excessive it 'shock[s] the conscience of the court.'") (emphasis added); *Reilly*, 1 F.3d at 1258 (recognizing discretion to deny fees); *Stackler*, 612 F.2d at 1059 (exercising discretion to deny fees).

Revere cannot point to any abuse of discretion committed by the Appeals Court, let alone an abuse of discretion sufficient for this Court to overturn the Appeals Court's decision. That is not surprising,

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[4] Even the less-restrictive penalty of a significant general reduction in hours only occurs in a "rare case." *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1251 (10th Cir. 1998) (finding that a general significant reduction in hours was not appropriate where case concerned novel legal issues and was vigorously litigated).

considering that several circuit courts have, in their exercise of discretion, refused to deny attorney's fees even where they found the fee request excessive. For example, in *Jordan* the D.C. Circuit held that, absent an outrageous or unprecedented fee request, if the plaintiff's application "was by the District Court's assessment somewhat excessive, the proper response was a reduction of the rate by the court before calculation of the lodestar." 691 F.2d at 521; *see also Reilly*, 1 F.3d at 1258 ("In a case of less egregious overbilling, we may impose a lesser sanction, such as awarding a fee below what a 'reasonable' fee would have been in order to discourage fee petitioners from submitting an excessive request"); *Mills v. Eltra Corp.*, 663 F.2d 760, 762 (7th Cir. 1981) (refusing to deny fee request "in toto" even though claim was "enormous and out of line" where attorney's "work was of substantial value."); *DiFilippo v. Morizio*, 759 F.2d 231, 236 (2d Cir. 1985) (ordering reduction in fee award where fee request was "grossly" and "facially" excessive).

II. REVERE'S TOTAL BAN ON ADULT VIDEO STORES VIOLATES THE FIRST AMENDMENT

Having argued doggedly (and unsuccessfully) for nearly 12 years that its Ordinance provides ample locations in Revere to open an adult video store, Revere – now hoping to pique this Court's interest – has dispensed with its unsubstantiated factual claims and retooled its argument as a legal one. No longer does Revere assert that its Ordinance permits adult video stores to open within its city limits. It is indeed a ban, Revere now argues, but it is a constitutional one because a municipality may totally ban all adult videos stores so long as the same or similar videos are available at other stores in Revere (stores exempt from

the Ordinance because their inventory consists only partly of adult materials).

As Revere would have it, there was no need for it to have amended its Ordinance in 1995 so that compliance became geometrically possible. Indeed, there was no need to have drafted any restrictions on setbacks, lot sizes, or the locations of properties containing adult uses; that was apparently all just window dressing to make the law look like a zoning ordinance, but purely optional window dressing on Revere's part. Instead, Revere suggests, it was free to have simply enacted a one-sentence provision banning all video stores whose inventory contains over 20% adult materials. Further, Revere claims that it would have been justified in doing so under this Court's time, place, manner jurisprudence. The argument fails for multiple reasons.

A. A Ban is Not a Time, Place, Manner Restriction

Revere's suggestion that a complete ban on adult video stores is a time, place, manner restriction cannot be taken seriously. A time, place, manner restriction is, by definition, *not* a ban. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 443 (2002) ("[A]n ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation *and not a ban.*") (emphasis added). Revere does not cite a single case of this Court — or *any* court — that even remotely suggests that a municipality may constitutionally ban all adult video stores from its borders. The proposition runs counter to over 30 years of this Court's decisions on the zoning of adult uses. This Court has consistently held that municipalities must provide adequate fora for establishments that provide non-obscene adult live entertainment, show adult

movies, or sell or rent adult videos and books. *See, e.g., Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 62 (1976) ("There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained."); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1981) ("To be reasonable, time, place, and manner restrictions not only must serve significant state interest but also must leave open adequate alternative channels of communication . . . Here, the Borough totally excludes all live entertainment, including nonobscene nude dancing that is otherwise protected by the First Amendment.") (citations omitted); *see also Alameda Books*, 535 U.S. at 443.

The case on which Revere purports to rest its argument, *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), in fact refutes its claim that a ban on adult video stores is permissible. In *Renton*, the ordinance in question left over five percent of the municipality's land, some 520 acres, available for adult theaters. *Id.* at 53. The district court found this acreage to consist of "ample, accessible real estate." *Id.* This Court upheld the ordinance in *Renton* specifically because it provided ample locations for adult theaters to operate:

> In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Id. at 54.

Revere's Ordinance, falling outside the ambit of this Court's time, place, manner jurisprudence, must be reviewed under the demanding strict scrutiny standard applicable to content-based regulations. Compare *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (strict scrutiny required for content-based restrictions on speech) with *Alameda Books*, 535 U.S. at 440 (lower, intermediate scrutiny standard applicable for content-neutral time, place manner restrictions). Under the strict scrutiny standard, the Ordinance must be narrowly tailored to serve a compelling government interest. *See Playboy*, 529 U.S. at 813.

B. The Ordinance Unconstitutionally Conditions the Exercise of First Amendment Rights on Compelled Speech

In hopes of finessing the strict scrutiny standard Revere argues that, notwithstanding its total ban on adult video stores, other stores in Revere sell the same videos as T&D, therefore "there is no suppression of speech" under the Ordinance. Petition at 13. If there is no suppression of speech, Revere suggests, then presumably the Ordinance passes constitutional muster under any conceivable standard of review.

This argument is a *non sequitur*. It assumes that the rights of listeners — here, adult video viewers — are the only rights at stake. It may be true that those patrons can go elsewhere in the city to rent adult videos, as Revere argues, or it may not be true. Regardless, to focus on the listener exclusively is to conduct only half of the analysis. The rights of speakers — here, parties like T&D who wish to sell

adult videos — are at stake as well as the rights of listeners.

It is clear under the case law that vendors such as T&D have a constitutional right to offer communicative works created by others for distribution and consumption. Indeed, all of the foregoing cases deal with the First Amendment rights of the speaker-vendor: the party operating the adult movie theater, not the moviemakers, *see Young*, 427 U.S. 50; *Renton*, 475 U.S. 41; the owner of the bar offering nude dancing, not the dancers, *see Schad*, 452 U.S. 61; the proprietor of the adult bookstore, not the authors. *See Alameda Books*, 535 U.S. 425. The Petition simply glosses over a vast body of First Amendment law on the rights of speakers. *See also Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . ..")

Taken to its logical extreme, Revere's argument would permit a ban on the sale of any adult videos within its city limits, so long as the adult movies in question were available through some channel other than retail stores. Revere insinuates as much when it claims that the movies T&D sells are available "from other sources, including the internet." Petition at 12. (The Court is left to surmise that everyone in Revere has internet access.)

What Revere is really arguing in its Petition, though backhandedly, is that it is permissible for a municipality to condition a store's sale of adult videos on its sale of non-adult videos. Revere attempted to impose such a condition on the sale of adult videos through its Ordinance. The Ordinance requires, in effect, that for every sexually themed video that a store

offers, the store must stock over four *non*-sexually themed videos (*i.e.*, for each adult title, over four copies of King Kong or North by Northwest or Titanic or some other non-adult fare). That is the only way a store's inventory would contain less than 20% adult materials and would escape the designation of a banned "adult video store." *See* App. B.

As authority for this novel proposition, Revere cites a First Circuit case holding that a historic district may lawfully ban newspaper vending machines where other sources of distribution exist, *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175 (1st Cir. 1996). That case might provide some precedent for Revere's ban *if* newspaper vending machines possessed First Amendment rights. In *Globe Newspaper*, the only speech rights at stake were those of the newspaper, the party that created the speech. *Id.* at 182. Here, by contrast, the vendor of the speech in question, T&D, possesses rights independent of the rights of the producers, directors, and actors who created the speech. T&D's constitutional rights are impinged when it is barred from distributing this speech to the public. The same obviously cannot be said of a vending machine. Had the law in *Globe Newspaper* banned individuals from selling newspapers, then the case might have offered some support for Revere's Petition; but the law did no such thing.

Certainly, *Globe Newspaper* has no bearing on Revere's suggestion that the government may condition the exercise of one's constitutional right (the sale of adult videos) on compelled communication (the sale of non-adult videos). Had the law in question required the press to distribute other communications in their vending machines, along with their newspapers, then *Globe Newspaper* would have offered some precedent for Revere; but, again, the law

did no such thing, and if it had, the First Circuit would have struck it down under this Court's precedents on compelled speech.

Those precedents are, remarkably, nowhere to be found in the Petition. No doubt Revere failed to mention this Court's extensive case law on compelled speech because these decisions completely foreclose the argument that Revere advances here. It has long been clear that the First Amendment places a general proscription on government-compelled speech. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-642 (1943). A corollary of this principle is that the government may not condition the exercise of one's rights on one's uttering compelled speech. In *Wooley v. Maynard*, 430 U.S. 705 (1977), for instance, this Court held that the state could not constitutionally require those wishing to drive a car to display a license plate espousing the state's ideology. *See id.* at 715 (finding repugnant that "driving an automobile, a virtual necessity for most Americans," was conditioned on "displaying 'Live Free or Die' to hundreds of people each day").

If the "right" to drive a car cannot be conditioned on one's uttering compelled speech, then necessarily the exercise of one's *constitutional* right to speak cannot be so limited. Numerous cases of this Court so hold. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (law compelling newspapers to publish replies to editorials violates the First Amendment); *Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781 (1988) (law requiring professional fund raisers to disclose portion of collections turned over to charity during previous year violates the First Amendment); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (public accommodation law violates First Amendment to the extent it requires parade's organizers to include

marchers expressing ideological views that organizers disagree with); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (anti-discrimination law violates the First Amendment right to associate to the extent it compels organization's inclusion of person whose ideological point-of-view is contrary to organization's).

Here, as noted above, even though T&D did not create the movies it sells, its role as a vendor of these materials is a form of speech protected under the First Amendment. T&D's selection of which videos to carry is an expressive activity, analogous to a public television station's or cable programmer's selection of which programs to carry. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.") (citation omitted); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek to communicate messages . . ..") (citation and internal quotation marks omitted). The First Amendment does not "require a speaker to generate, as an original matter, each item featured in the communication." *Hurley*, 515 U.S. at 570.

Thus, just as the government could not lawfully compel the speakers in the foregoing cases to include an item of speech in their selections and compilations, Revere may not compel T&D to dilute its adult video offerings by acquiring and purveying over four times as many non-adult videos. Indeed Revere could not lawfully compel T&D to stock even a single copy of a non-adult video. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) ("There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification.").

C. The "Barren" Legislative Record in this Case Precludes Revere From Proving a Compelling Interest in Curbing the Secondary Effects of Adult Entertainment

Revere cannot establish that it had a compelling interest in controlling the secondary effects of adult entertainment in Revere because the Ordinance's legislative record contains virtually no data or research bearing on this topic.

The relevant facts regarding the enactment of the Ordinance have been recounted in the Statement of the Case, *supra*, and excerpts of key testimony are set out in the appendices to this Opposition. Suffice it to say, two days after the City Council learned that T&D planned to open a bookstore, the Mayor presented to the Council a draft Ordinance which was largely a copy of ordinances enacted by other towns (but with the setback requirements arbitrarily increased). The evidence indicates that the Ordinance was informed only by the Revere City Planner's intuitions and prejudices. *See* App. D. The record contains no fact-finding by Revere regarding the secondary effects stemming from its existing adult uses (*e.g.*, the Squire Lounge or the three video stores that sold adult videos at the time T&D opened its store). It is conceded that the City Council did not attempt to obtain the investigations of the other cities, on whose laws the Ordinance was patterned. *See* App. at 28a-29a. Indeed, the City Council apparently enacted the law with absolutely no information on the subject of adult uses and secondary effects.

For these reasons, the Massachusetts Supreme Judicial Court agreed with the trial court that "[t]he legislative record is barren" in this case. *T&D*, 423 Mass. at 581.

Clearly, the secondary effects of adult entertainment can create significant problems for towns and cities, which towns and cities are entitled to regulate with *reasonable*, content-neutral, time, place, manner restrictions. *See Alameda Books*, 535 U.S. at 444-45 (Kennedy, J., concurring). It does not follow from this observation that municipalities are free to enact laws restricting speech, with virtually no investigation of the ills that the laws are supposed to cure, simply by invoking secondary effects. The legislative record here falls far short even of the standards this Court has set for municipalities passing content-neutral zoning laws. While one municipality may rely on another's data and research when enacting an adult use zoning ordinance, *see Renton*, 475 U.S. at 51-52, this Court has never suggested that one municipality may simply enact the text of another's ordinance without considering the research and data that gave rise to the law; without considering whether secondary effects in fact require remediation; and with no effort to limit the abridgement of protected speech. *See id.* at 51 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*") (emphasis added); *Alameda Books*, 535 U.S. at 438 ("This is not to say that a municipality can get away with shoddy data or reasoning. *The municipality's evidence must fairly support the municipality's rationale for its ordinance.*") (emphasis added). The "barren" record in this case fails this Court's standards, as set forth in *Renton* and *Alameda Books*, for justifying content-neutral, time, place, manner restrictions.

Having failed to meet even the comparatively low standard for justifying a content-neutral restriction on speech, Revere necessarily failed to establish a compelling interest in combating the secondary effects of adult uses. Perhaps this was not an insurmountable bar for Revere to meet; but its slapdash legislative efforts fell far short.

D. A Ban on Adult Video Stores is Not Narrowly Tailored to Reduce the Secondary Effects of Adult Entertainment

Revere fails the other prong of the strict scrutiny standard as well. Revere cannot seriously argue that a *ban* on adult video stores is narrowly tailored to controlling the secondary effects of such stores. The cases Revere cites suggest nothing of the sort.

This Court has previously upheld a variety of content-neutral restrictions that municipalities may impose upon adult uses in an effort to curb the secondary effects of such uses. These include restricting the use to certain zoning districts, as well as imposing minimum distance requirements relative to residential areas, schools, churches, and other adult uses. *See, e.g., Young*, 427 U.S. 50; *Renton*, 475 U.S. 41; *Alameda Books*, 535 U.S. 425. Clearly Revere was aware of these restrictions, as well as others, such as those setting parameters for the size of the lot in question; those requiring setbacks from the street and other properties; or those restricting signage outside the adult use. *See* Appendices A and B.

Yet Revere has never availed itself of *any* of these methods. While it is true that Revere's Ordinance was styled as a zoning law, it was in fact a

ban, as Revere now concedes. Having never made any attempt to pass lawful, content-neutral zoning restrictions on adult uses, nor any attempt to research the secondary effects of adult uses within the city, Revere can hardly argue that only a ban on adult video stores will suffice to curtail their secondary effects. As noted in Part II(C) above, the legislative record in this case would not even support a content-neutral time, place, manner restriction on space, let alone a ban on adult video stores.

Assuming *arguendo* that a ban such as the one here could ever be constitutional, a city council would have to engage in an extensive fact-finding process in order to prove that the ban was narrowly tailored. The city would have to investigate, among other things: whether less restrictive approaches were available, such as zoning laws; whether support existed for the assertion that stores selling non-adult videos along with adult videos experience diminished secondary effects; whether support existed for setting a 20% inventory of adult videos as the threshold at which the store must be banned; whether the requirement that a store sell 80% non-adult videos would raise the barrier to entry for new stores planning to sell adult videos and thereby suppress speech; and whether stores selling non-adult videos along with adult videos would increase the likelihood of minors gaining access to adult videos.

Needless to say, one will not find the answer to any of these questions in the Ordinance's legislative record, which, as noted above, is virtually devoid of information. Nor would one expect to find such information in the record since, as noted, at the time it passed the Ordinance in 1993, and throughout much of this litigation, Revere was emphatic that its law was *not* a ban. *See* App. at 22a. (Revere's City Planner testifying that Ordinance was intended to

"still allow[] adult uses to exist within the community."); App. E (Mayor of Revere opining to City Council that "communities cannot totally prohibit adult uses . . .."). The legislative record could hardly be expected to establish the need for a total ban when the law's drafters have all along urged that it was not a ban and that bans are, in fact, illegal.

Revere's suggestion that its ban on adult video stores was narrowly tailored is absurd. Thousands of municipalities across the country use content-neutral zoning restrictions to control the secondary effects of adult entertainment. Revere cannot seriously argue that its ban on adult video stores is narrowly tailored to achieve these same ends — particularly where it has never even attempted to zone adult uses as other cities and towns do. It is hardly surprising that the Appeals Court disposed of Revere's argument in a footnote. *See* Petition at 39a n.8.

E. The Ordinance is Unconstitutional Because it was Enacted Specifically to Prevent T&D from Opening an Adult Video Store

Finally, the Court should deny Revere's Petition because it is clear that Revere passed the Ordinance to prevent T&D from opening an adult video store. The complete lack of fact-finding by Revere confirms that the Ordinance was not designed as a general measure to prevent the secondary effects of adult entertainment, but rather as a means of zoning T&D out of Revere. The trial court so found. *See* App. H; *see also* Petition at 22a (holding that Revere's "unconstitutional zoning regulations [were] enacted for the sole purpose of 'zoning out' T&D Videos [*sic*] proposed use of its premises as an adult entertainment video and bookstore").

The Appeals Court did not disturb the trial court's findings, though it held that "unspoken legislative motivations" were irrelevant to its constitutional analysis. Petition at 37a. In this regard, the Appeals Court certainly erred. It is well-settled that a regulation "is sufficiently justified *if* . . . the governmental interest is unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (emphasis added); *see Playboy*, 529 U.S. at 812 ("One sponsor of the measure even identified appellee by name . . . Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles."); *see also Renton*, 475 U.S. at 54 (upholding ordinance where municipality had not "used the power to zone as a pretext for suppressing expression") (citation and internal quotation marks omitted).

The trial court's undisturbed rulings are now beyond review, and provide yet another basis for this Court to deny the Petition. If a single Congresswoman's statement that a law will cover a particular speaker evidences that law's illicit purpose, *see Playboy*, 529 U.S. at 812, then certainly the trial court's rulings are conclusive evidence that the Ordinance unconstitutionally singled out T&D.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: April 27, 2007

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APPENDIX A

AN ORDINANCE FURTHER AMENDING THE ZONING ORDINANCE OF THE CITY OF REVERE

SECTION 1

That Title 17, Chapter 17.16, Section 17.16.040 of the Revised Ordinance of the City of Revere be amended by adding the following to the Use Regulation Table under Business Uses:

ADULT ENTERTAINMENT ESTABLISHMENTS, ADULT BOOKSTORE, ADULT VIDEOSTORE, ADULT MOTION PICTURE THEATRE & ADVERTISEMENT SIGNS

RA	RB	RB1	RC	RCI	RC2	RD	NB	GB	CB	HB	I	PDD-1
NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	SP	NO

SECTION 2

That Title 17, Chapter 17.16 of the Revised Ordinance of the City of Revere be amended by inserting the following new section:

Section 17.16.045 Adult Entertainment Establishments Adult Bookstore, Adult Videostore, Adult Motion Picture Theatre & Advertisement Signs or Devices within the I District. Adult entertainment establishments, adult bookstore, adult videostore, adult motion picture theatre and advertising signs or devices erected, constructed, placed, altered, converted or otherwise changed may be allowed by special permit in the I District in conformance with the following minimum criteria:

A. Adult Entertainment Establishments, adult bookstore, adult videostore, adult motion picture theatre and advertising signs or devices may not be located less than 1000 (one thousand) feet from the

nearest lot line of: each other; public or private nursery schools; public or private day care centers; public or private kindergartens; public or private elementary schools; public or private secondary schools; playgrounds; parks; conservation areas; churches; residential uses; and residential districts.

B. A 30 ft. wide landscaped strip shall be provided along the property line fronting a public or private way.

C. Adult Entertainment Establishments, Adult Bookstores, Adult Videostores, Adult Motion Picture Theatres and advertising signs or devices are to be limited to lots greater than 25,000 square feet but not more than 40,000 square feet.

D. Adult Entertainment Establishments, Adult Bookstores, Adult Videostores, Adult Motion Picture Theatres and advertising signs or devices may not be allowed within a multi-use building or building containing other retail or consumer uses.

E. All advertising signs and adult entertainment uses, adult bookstores, adult videostores, and adult motion picture theatres shall not be located within 100 ft. of a public or private way and must be set back a minimum of 100 ft. from all property lines.

F. No adult use advertising sign shall contain any moving, flashing or animated lights, or visible moving or movable parts.

SECTION 3

Title 17, Chapter 17.08 of the Revised Ordinances of the City of Revere is hereby amended by inserting the following new section:

Section 17.08.065 Adult Entertainment Establishment. "Adult Entertainment Establishment" means any establishment which displays entertainment which is distinguished or characterized by its emphasis depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.

Section 17.08.066 Adult Bookstore. "Adult Bookstore" means an establishment having as a substantial or significant portion of its stock in trade, rental or sale, books, magazines, and other matter which are distinguished or characterized by their emphasis, depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.

Section 17.08.067 Adult Videostore. "Adult Videostore" means an establishment having as a substantial or significant portion of its stock in trade, rental or sale, videos and other matter which are distinguished or characterized by their emphasis depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of two hundred and seventy-two.

Section 17.08.068 Adult Motion Picture Theatre. "Adult Motion Picture Theatre" means a building used for presenting materiel distinguished by an emphasis on matter depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.

Section 17.08.069 Adult Use Advertisement Sign. "Adult Use Advertisement Sign" means an advertising sign or device which advertises an adult entertainment use, adult bookstore, adult videostore or adult motion picture theatre and/or advertises the trade, rental or sale of material distinguished by an emphasis on matter depicting depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.

APPENDIX B

City of Revere
City Council

Date: May 1, 1995

City Council Order No. CZ-95-2/95-222

Offered By Councillor Colarossi

PLAINTIFF'S
EXHIBIT
6
1-9-97

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF REVERE AS FOLLOWS:

Section 1. Title 17, Chapter 17.08 of the Revised Ordinances of the City of Revere is hereby amended by deleting Sections 17.08.065, 17.08.066, 17.08.067, 17.08.068 and 17.08.069, and in place thereof, the following new Sections are inserted:

17.08.065(A) Adult bookstore. "Adult bookstore" means an establishment having substantial or significant portion of its stock in trade, rental or sale, books, magazines and other matter which are distinguished or characterized by their emphasis, depicting, describing or relating to sexual conduct or sexual excitement as defined in Section thirty-one of Chapter two hundred seventy-two, M.G.L., and which shall be deemed to include so-called sexual aids, mechanical and non-mechanical stimulators and objects fashioned to resemble or perform certain of the functions of the human sexual organs and genitalia. (C.O. 93-504 sec.3 (part))

17.08.065(B) Adult entertainment establishment. "Adult entertainment establishment" means any establishment which displays entertainment which is distinguished or characterized by its emphasis depicting, describing or relating to sexual conduct or sexual excitement as defined in Section thirty-one of Chapter two hundred and seventy-two, M.G.L. (C.O. 93-504 sec.3 (part))

17.08.065(C) Adult motion picture theater. "Adult motion picture theater" means a building used for presenting material distinguished by an emphasis on matter depicting, describing or relating to sexual conduct or sexual excitement as defined in Section thirty-one of Chapter two hundred seventy-two, of M.G.L. (C.O. 93-504 sec.3 (part)

17.08.065(D) Adult use. "Adult use" means a use (whether partially or on its entirety) of a building or business for the purpose of engaging in the sale, display, hire, trade, exhibition or viewing of materials or entertainments depicting, describing, or relating to sexual conduct or sexual excitement as defined in Section thirty-one of Chapter two hundred seventy-two, of M.G.L. (C.O. 93-504 sec.3 (part)).

17.08.065(E) "Adult use advertisement sign. "Adult use advertisement sign" means an advertising sign or devise which advertises an adult entertainment use, adult bookstore, adult video store, or adult motion picture theater and/or advertises the trade, rental or sale of material distinguished by an emphasis on matter depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of Chapter two hundred seventy-two, of M.G.L. (C.O. 93-504 sec.3 (part)).

17.08.065(F) Adult video store. "Adult video store" means an establishment having as a substantial or significant portion of its stock in trade,

rental or sale, videos and other matter which are distinguished or characterized by their emphasis depicting, describing or relating to sexual conduct or sexual excitement as defined in Section thirty-one of Chapter two hundred seventy-two, M.G.L. (C.O. 93-504
sec. 3 (part)).

17.08.065(G) Substantial or Significant Portion. "Significant or substantial portion" means at least that portion of (i) retail sales accounting for at least twenty percent of gross sales or (ii) merchandise accounting for at least twenty percent of total merchandise available for sale or (iii) shelf-space and display space which when combined is in excess of eighty (80) square feet.

Section 2, Title 17, Chapter 17.16 of the Revised Ordinances of the City of Revere is hereby amended by deleting Section 17.16.045, and in place thereof, the following new Sections are inserted:

17.16.045(A) Adult entertainment establishment and businesses promoting Adult uses within the City of Revere. Based upon the experience of other communities, particularly the evident problems which existed in those portions of the City of Boston bordering and included within the so-called "Combat Zone", the City Council of the City of Revere finds that the proliferation of adult entertainment establishments (as said term is herein defined) will have an adverse on the community by, among other impacts, limiting economic development and reducing residential property values. Furthermore, the City Council finds that adult entertainment establishments, if situated near school, parks or conservation areas, houses of worship, nursery schools, day care centers, kindergartens or playgrounds would have an adverse impact on the youth of this City.

17.16.045(B) General Limitation. Notwithstanding any term or condition within the so-called Table of Uses within these Revised Ordinances, or any other provision of said Revised Ordinances, no adult entertainment establishments, adult bookstore, adult video store, adult motion picture theater and advertising signs or devices may be (i) erected, constructed placed altered converted or otherwise changed in any district other than the "I" District or (ii) erected, constructed, placed, altered, converted or otherwise changed without the issuance of a Special Permit issued by the City Council or (iii) erected, constructed placed, altered or converted if it is within three hundred feet of the line of any lot which itself contains either an adult entertainment establishment, adult bookstore, adult video store, adult motion picture theater or adult advertising signs or devices.

17.16.045(C) Special Permit Considerations for adult entertainment establishments and adult motion picture theaters. No special permit may be granted for any adult entertainment establishment or adult motion picture theater unless each of the following conditions are fully satisfied:

1. Adult entertainment establishments and adult motion picture theaters may not be located less than one thousand feet (1,000) from the nearest lot line of: each other; public or private nursery schools; public or private day care centers; public or private kindergartens; public or private elementary schools; public or private secondary schools; playgrounds; parks; conservation areas; houses of worship; residential uses; and residential districts.

2. A thirty foot-wide landscaped strip shall be provided along the property line fronting a public or private way.

3. No adult entertainment establishments or adult motion picture theater may be situated on any lot which is less than twenty-two thousand feet nor more than sixty-six thousand square feet.

4. Adult entertainment and adult motion picture theaters may not be allowed within a building containing other retail, consumer or residential uses.

5. No adult entertainment establishments and adult motion picture theaters shall be located within fifty feet of a public or private way and must be set back a minimum of fifty feet from all property lines.

6. A material condition to every special permit issued with respect to any adult entertainment establishment and adult movie theater shall that such establishment or theater must cease its business operations between the hours of 1 a.m. and 10 a.m. each day.

7. No adult entertainment establishment or adult motion picture theater may have visible from outside the establishment or theater any flashing lights.

8. No adult entertainment establishment or adult motion picture theater shall be eligible to apply for a special permit requesting a freestanding accessory sign.

9. Each applicant for a special permit to operate an adult entertainment establishment of adult motion picture must provide on a plan submitted with its application adequate parking on the same lot said establishment or theater in the following ratio: 1 parking space for every 1.25 person allowed for said establishment's seating capacity.

17.16.045(D) Special Permit Consideration for adult bookstores and adult video stores. No special permit may be granted for any adult bookstores or adult video stores (collectively said bookstores and video stores hereinafter referred to as "adult merchandise establishments") unless each of the following conditions are fully satisfied:

1. Adult merchandise establishments may not be located less than one thousand feet (1,000) from the nearest lot line of: each other; public or private nursery schools; public or private elementary schools; public or private secondary schools; playgrounds; parks; conservation areas; houses of worship; residential uses; and residential districts.

2. A twenty-five foot wide landscaped strip shall be provided along the property line fronting a public or private way.

3. No adult merchandise establishments may be situated on any lot which is less than sixteen thousand square feet more more [*sic*] than sixty-six thousand square feet.

4. Adult merchandise establishments may not be allowed within a building containing other retail, consumer or residential uses.

5. No adult merchandise establishments shall be located within thirty feet of a public or private way and must be set back a minimum of at least thirty feet from all property lines (unless applicable zoning regulations provide for a greater set back).

6. A material condition to every special permit issued with respect to any adult merchandise establishment shall that such establishment or theater must cease its business operations between the hours of 11 P.M. and 9 A.M. each day.

7. No adult merchandise establishment may have visible from outside the establishment or theater any flashing flights.

8. No adult merchandise establishment shall be eligible to apply for a special permit requesting a free-standing accessory sign.

17.16.045(E) Special Permit Consideration for Adult use advertisement signs. No special permit may be granted for any adult use advertisement signs unless each of the following conditions are fully satisfied:

1. Adult use advertisement signs may not be located less than one thousand feet (1,000) from the nearest lot line of: each other; public or private nursery schools; public or private day care centers; public or private secondary schools; playgrounds; parks; conservation acres; houses of worship; residential uses; and residential districts.

2. Adult use advertisement signs may only be located on a building in which there is operating either an adult merchandise establishment, adult entertainment establishment or adult movie theater pursuant to a special permit issued by the City Council.

3. The highest point on any adult use advertisement sign may be no higher than twenty-four feet above ground level.

4. No adult use advertisement sign may contain any moving, flashing or animated lights, or visible moving or movable parts.

17.16.045(F) Construction; conflicts. In the event that the applicable provision of the zoning ordinances set forth in these Revised Ordinances

imposes greater dimensional or setback requirements than do the provisions of ss 17.16.045 et seq., the greater requirements of the zoning ordinances shall apply. No structure shall contain both an adult merchandise establishment and either an adult entertainment establishment or adult movie theater.

April 24, 1995:	ORDERED to a first reading
May 1, 1995:	ORDERED to a second reading
May 1, 1995	ORDERED to a third and final reading.
May 1, 1995:	ORDERED ENGROSSED AND ORDAIN: on a Roll Call: Councillors Buonfiglio, Colarossi, Colell, DelGrosso, DiCarlo, Guinasso, Jordan, Penn, Penta and Fiore voting "YES." Councillor Caporale absent.

Attest: John J. Henry,
City Clerk

APPROVED:

/s/ ROBERT J. HAAS, JR.
MAYOR ROBERT J. HAAS, JR.

May 5, 1995
DATE

Attest:
/s/ John J. Henry
City Clerk

APPENDIX C

PAGES 1-111
VOLUME 4

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.
No. SUCV-1994-6879

SUPERIOR COURT
Department of the
TRIAL COURT

T&D VIDEO

V

CITY OF REVERE

Boston, Massachusetts
August 23, 2002
Before: J. Murphy

PAULA CONNELLY, CVR
OFFICIAL COURT REPORTER

EXCERPTS OF TRIAL TESTIMONY OF JOSEPH FERRUZZI

[40]

. . .

Q Now, let's stay on page 20. In this colloquy you had with Councilors Arigo and Kollella, you were asked, "What did they tell you?" and you said, "They expressed to me their concern that there was an adult video store going to be located in Revere someplace, possibly this location."

And you were asked, "Did they ask something about it?" and you responded --

MR. ZALEZNIK: Object, Your Honor.

THE COURT: Well, I mean, I'll hear what he --

MR. ZALEZNIK: He's holding the deposition.

THE COURT: Well, I know, but it's a question of whether or not this is coming into evidence, and the answer is it isn't. I'm just not -- this isn't admissible testimony **[41]** just because Mr. Alberich is reading from the deposition.

Q Well, when I asked you, "Did they ask you to do something about it," what was your response to that, according to this deposition transcript? The top of page 21.

A Page 21, line 1 and 2 says, "To my recollection, they asked me to not allow it."

Q Is that accurate? Is that what you said?

A To the best of my recollection, correct.

THE COURT: You mean is that what he said to them or is that what he said on this deposition or?

MR. ALBERICH: Is that what he said in his deposition.

A That's what I said in my deposition, yes.

And that was a truthful statement, correct?

A To the best of my knowledge, yes.

Q Okay. And then you were asked, **[42]** "What did they mean by not allowing?" And what was your answer to that question?

A Line 5, "To not issue --"

Well not line 5, you can just tell me. Does line 5 accurately describe your answer to that question during the deposition?

A Yes.

Q Okay. And what does it say?

A To not issue permits for that use.

Q Okay. And you were asked then, on line 9, "What did you say about that?" And to the best of your recollection, what did you say when they asked you not to issue permits for that place?

MR. ZALEZNIK: Object, Your Honor.

THE COURT: I'm going to overrule the objection

Q What did you say?

THE COURT: You may answer.

Q What did you say, Mr. Feruzzi?

A At that point in time, the zoning ordinance did not prohibit that use.

Q And that's what you told them?

[43]

A Yes.

Q Okay. And then you were asked, "What was the response to your informing the city councilors that it wasn't prohibited by the ordinance?" And

to the best of your recollection, how did you respond to that question?

A Could you rephrase that, please?

Q When you were asked what was the response to your informing these city councilors that it wasn't prohibited by ordinance, how did you respond to that question in the deposition?

A I didn't respond.

Q You responded to the question.

A Oh, okay. I'm sorry. I'm getting a little confused.

Their response, as I stated in the deposition, that they would then, as city councilors who write the zoning ordinance, they would get together with the city planner and draft an ordinance.

Q Well, let's be a little clearer on this. The question asked to you was, "What **[44]** was the response to your informing these city councilors that it wasn't prohibited by an ordinance?" Your answer is, "They would get together with the city planner and draft one." Correct?

A Correct.

Q All right. And is that an accurate statement of your answer to that question?

A Yes.

Q Okay.

MR. ALBERICH: I have no further questions, Your Honor.

. . .

APPENDIX D

PAGES 1-151
VOLUME 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.
No. SUCV-1994-6879

SUPERIOR COURT
Department of the
TRIAL COURT

T&D VIDEO

V

CITY OF REVERE

Boston, Massachusetts
August 22, 2002
Before: J. Murphy

PAULA CONNELLY, CVR
OFFICIAL COURT REPORTER

EXCERPTS OF TRIAL TESTIMONY OF FRANK L. STRINGI

[48]

. . .

Q Mr. Stringee, prior to drafting the 1993 ordinance, you never investigated to see if there were any adult book stores in Revere, did you?

A No, I did not.

Q And prior to drafting the ordinance, you never investigated to see whether there were video stores selling adult videos in Revere, did you?

A No.

Q And you were not aware, at the time you were drafting this ordinance, that there were video stores in Revere selling adult videos; is that correct?

A That's correct.

Q And you were not aware, consequently, that those video stores were within a hundred and two hundred feet of **[49]** residential areas, correct?

A Correct.

Q So prior to drafting the ordinance, you never detected any neighborhood deterioration for increased crime in the neighborhoods that surrounded those stores where adult videos were being sold, did you?

A No.

Q Now, you said that you obtained information -- you said in your deposition that you obtained some of the dimensional requirements -- at least a thousand foot setback dimensional requirements -- that you used in the Revere ordinance from the Stoughton & Peabody ordinance; is that correct?

A You mean a hundred foot?

Q A thousand foot dimensional. The thousand foot --

A Setback?

Q I'm sorry. If I said setback –

A I think you did say setback.

Q The thousand foot dimensional **[50]** requirements -- a thousand feet from neighborhood schools, parks -- you said you obtained from the Stoughton & Peabody ordinances?

A I obtained from those ordinances that they had included setbacks from residential areas and sensitive receptors in their ordinances.

Q Okay. What were the degrees of separation, let's put it that way, of adult uses to neighborhoods in those ordinances; do you remember?

A I believe Stoughton was 750 feet. Peabody was less than that.

Q In fact, in the Peabody ordinance, isn't it true that the only requirement for adult bookstores is that they be 200 feet from residential areas? Do you recall that?

A Yes.

Q So when you were testifying before about where you could place all adult uses, by virtue of this thousand feet requirement you're putting in, that thousand foot requirement was your idea?

[51]

A It was my idea and I also saw that in the "Land/Use Manager," back in 1983, that there was a town -- I can't remember the town, but they had included a thousand foot pre--qualifier.

Q But you chose a thousand?

A Sure.

Q And if you had chose 200 or 750 or 500, there might have been other areas in Revere, aside from the general industrial area, where adult uses could have been sited, correct?

A Not 500. I think less than 500 you'd have more flexibility. Even with 500, it's very tight.

Q Well, if you made it, for instance, 250 feet for bookstores and videos and 500 feet for live dance entertainment, there would have been many more sites in Revere that could have had adult uses, correct?

A Yes.

Q Now, you testified before that your thoughts about neighborhood **[52]** deterioration came from your experiences with the Surf, correct?

A And the Squire Lounge.

Q And the Squire Lounge. Both of which are bars, correct?

A Yes.

Q That provide live, not nude, dance entertainment?

A Nude dance entertainment, yes.

Q But you had testified in your deposition that when you drafted the adult ordinance, based on your opinions, that your opinion was that any type of adult use would have the same affect on a residential neighborhood, regardless of the different types of adult entertainment, correct?

A That's my opinion.

Q And that certainly influenced the dimensional requirements that you put into the ordinance, correct?

A Yes.

Q Not only in terms of using a thousand feet, but using a thousand feet for everything; adult bookstores, adult video **[53]** stores, correct?

A Correct.

Q And in your view, you testified the negative affects on the neighborhood would be the same, regardless of whether an adult use was a video store or a bar featuring live, nude entertainment, correct?

A Correct

Q But you also testified that there are -- you have no studies or reports or any other information that supported that view, correct?

A In my own -- my own opinion, my own observations of adult uses in the City of Revere.

Q You testified that that was your observations on the Squire Lounge and the Surf?

A I don't differentiate between a lounge or a video store. They still sell the same material, and that's sexually related

Q Okay. So anything, if it's sexually related, gets the same kind of **[54]** treatment, correct?

A You're going to get the same person that goes to an adult video store go to the Squire Lounge.

Q To get back to my question, you didn't have any studies or reports or anything else that indicated that adult video stores or bookstores needed the same kind of separation as bars featuring live, nude entertainment?

A No. There was nothing documented that I could put my hands on.

Q And you drafted the ordinance based on your opinion that every adult use required, quote, "the strictest regulations," correct?

A Yes.

Q And from your discussions with Mr. Arigo, you had an understanding that he, too, wanted to impose the strictest regulations on adult entertainment, right?

A Yes.

Q And in determining the adult ordinance provisions that you were going to **[55]** use, and you used, quote, "the harshest measures possible," end quote, correct?

A The harshest measures possible but still allowing adult uses to exist within the community.

Q But you've testified under oath that you chose the harshest measures possible, correct?

A Yes.

Q And when you spoke to the members of the planning board, as you said you did at that public hearing, did you discuss with them the secondary affects that you were concerned about and how each of these provisions were supposed to address those secondary affects?

A I believe I did.

Q You did. Did you tell them that you were looking to use the harshest measures possible?

A Yes.

Q You did. And did you tell them that this was drafted in order to treat all adult uses the same because, in your view, **[56]** all adult uses would have the same impact on the neighborhood.

A Yes.

Q. And you testified that, in your opinion, the people who seek to rent an adult video must be interested in prostitution, which creates more crime in Revere; is that correct?

A. Yes.

MR. ZALEZNIK: Object, Your Honor.

THE COURT: Overruled.

Q. But you have no factual basis for that opinion?

A. It's my own observation of the community.

Q. But you said that you were not even aware that there were adult video stores -- that there were video stores in Revere selling adult videos in

neighborhoods prior to drafting this law: isn't that correct?

A. Right.

. . .

APPENDIX E

The City of REVERE, MASSACHUSETTS
OFFICE OF THE MAYOR
281 BROADWAY, REVERE, MA 02151
(617) 286-8110 •FAX (617) 286-8199

September 16, 1993

Honorable City Council
Revere City Hall
Revere, MA 02151

Dear Members:

Please find attached an ordinance amendment regulating Adult Uses such as adult entertainment establishments, adult bookstores, adult videostores, adult motion picture theatres and adult use advertising signs. The Zoning Ordinance of the City of Revere presently does not provide adequate protection against such uses in terms of preserving community standards and character. It is the intent of this ordinance to properly regulate adult uses and advertisement signs in conformance with Chapter 40A Section 9a of the Zoning Enabling Act.

The attached Adult Use Ordinance regulates adult uses by special permit within the Industrial District under a set of specific and restrictive conditions which have been designed to preserve the general welfare and character of our predominantly residential community.

It must be noted that under the State Zoning Enabling Act, communities cannot totally prohibit adult uses but are authorized to regulate such uses via the special permit process. Since the present zoning

ordinance does not afford this protection, it is strongly encouraged that Your Honorable Body authorize advertisement of this amendment.

Respectfully,

/s/ Robert J. Haas, Jr.
Robert J. Haas, Jr.
Mayor

C: Frank Stringi, City Planner
Richard Villiotte, City Solicitor
Joe Ferruzzi, Building Inspector

APPENDIX F

PAGES 1-151
VOLUME 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.
No. SUCV-1994-6879

SUPERIOR COURT
Department of the
TRIAL COURT

T&D VIDEO

V

CITY OF REVERE

Boston, Massachusetts
August 22, 2002
Before: J. Murphy

PAULA CONNELLY, CVR
OFFICIAL COURT REPORTER

EXCERPTS OF TRIAL TESTIMONY OF RICHARD PENN

[139]

. . .

Q To the best of your knowledge, Mr. Penn, when the city council was considering the adult zoning ordinance, both at its October '93 and November '93 meetings, there were no documents before the city council relating to the supposed secondary affects of adult entertainment on surrounding neighborhoods, correct?

MR. ZALEZNIK: Objection.

THE COURT: I'm going to let him answer that. Overruled.

To the best of your knowledge, did you see any documents having to do with --

THE WITNESS: To the best of my knowledge, I do not recall any documents.

[140]

Q And you and the city council members received no such materials or information in conjunction with your consideration of the ordinance back in November of '93, correct?

MR. ZALEZNIK: Object, Your Honor.

THE COURT: Overruled.

Q Your answer?

A I do not recall any such documents

Q Okay. And the city council never voted or requested or commissioned any kind of an investigative report on possible secondary affects for the various kinds of adult entertainment prior to considering this ordinance, correct?

MR. ALBERICH: Object, Your Honor.

THE COURT: Overruled.

A That is correct.

Q And at the time it was considering, or before it considered this particular ordinance, the city council didn't investigate or commission any investigation of secondary affects of the **[141]** existing adult entertainment establishments in the City of Revere, correct?

MR. ALBERICH: Object, Your Honor.

THE COURT: Overruled.

A The city council did not request such information.

Q Did the city council ask any officials, such as the zoning or tax officials, for any information regarding the provisions in the adult ordinance that dealt with lot size restrictions and setbacks and what the impact of all of those would be?

MR. ALBERICH: Object, Your Honor.

THE COURT: Overruled.

A Not to my knowledge.

Q And did you ever ask for any such information individually?

A No, I did not

Q And you never had any discussions with Mr. Stringee about the adult entertainment ordinance before the city council before you voted on it in October or November of '93, correct?

A No, I did not.

. . .

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APPENDIX G

PAGES 1-151
VOLUME 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.
No. SUCV-1994-6879

SUPERIOR COURT
Department of the
TRIAL COURT

T&D VIDEO

V

CITY OF REVERE

Boston, Massachusetts
August 22, 2002
Before: J. Murphy

PAULA CONNELLY, CVR
OFFICIAL COURT REPORTER

EXCERPTS OF TRIAL TESTIMONY OF JOHN ARIGO

. . .

[146]

Q And you testified at your deposition that you felt that if the Peabody ordinance was past in Peabody then you could pass the same ordinance in Revere, correct?

A Correct

Q All right. And that was -- you spoke to Mr. Stringee and he told you that Peabody had passed this ordinance, that was essentially all he told you about the Revere ordinance before you voted for it, correct?

MR. ZALEZNIK: Object, Your Honor.

THE COURT: I'll allow that. Overruled.

A I don't -- like, again, when we talked Peabody, I don't know if it was specifically -- and I can't remember -- just for adult video. We were looking at any --

THE COURT: Well, he's referring, sir, to the Peabody ordinance dealing with **[147]** adult entertainment.

THE WITNESS: That's what I'm saying, but --

THE COURT: No, no. He's asking you a specific question. Did you talk with Mr. Stringee about anything else other than if the ordinance had been enacted in Peabody, why not do it in Revere? Was there anything else about adult entertainment that you and Mr. Stringee discussed, that's the question.

THE WITNESS: No.

THE COURT: Okay. Fine. The answer is no.

Q At the time you were considering the adult entertainment ordinance, the city council had no evidence in front of it to show that all adult video stores or all adult uses would have the same negative affects on neighborhoods of Revere, correct?

MR. ZALEZNIK: Object, Your Honor.

THE COURT: I'll overrule it. Do you remember any evidence about affects?

THE WITNESS: No, not really.

[148]

THE COURT: Okay. He answered no.

Q And at the time, when this whole business came up of an adult use ordinance, you testified that what you really would like to do is just block all adult uses anyway, correct?

MR. ZALEZNIK: Object, Your Honor.

THE COURT: I'll allow it. Overruled.

A I said that I think in my deposition, but I mean at the testimony, it wasn't -- an adult video wasn't a big deal to me. I mean, it was -- like I said, I had a lot more worry than adult video.

Q All right.

A I mean, I think it was in my ward and if people go there, they don't -- for me, I don't really care less. I mean --

THE COURT: Okay.

Q You testified, too, that if adult uses were required to have a special permit, and you can't see why you couldn't just reject adult use requests across the board, correct?

[149]

A That's right. That's what I --

MR. ZALEZNIK: Object, Your Honor.

THE COURT: I'll allow it.

A That's right, but I think Mr. Stringee -- a lot of things –

THE COURT: Can you say the state of mind that the city council may have some bearing?

THE WITNESS: You know, transfer stations, they couldn't -- there were a lot of things that I said let's just reject them -across the board, then I was told by Mr. Stringee we just can't do that. You know, you had to do -- allow things. So my concern was like anything else, de-buffer zones, I don't care, make it as stringent as possible or anything. I mean, on any –

Q Okay. That's fine.

A Okay.

MR. ALBERICH: Nothing further.

. . .

APPENDIX H

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 94-6216A

T & D VIDEO, INC.
d/b/a MOONLITE READER

v.

THE CITY OF REVERE, MASSACHUSETTS,
THE ZONING BOARD OF APPEALS OF
THE CITY OF REVERE, MASSACHUSETTS,
EDWARD ELFMAN, as Chairman of the
Zoning Board of Appeals of Revere,
ALFRED BUCCILLI, as Member of the
Zoning Board of Appeals of Revere,
ANTHONY GIANNINO, as Member of the
Zoning Board of Appeals of Revere,
PETER LATTANZI, as Member of the
Zoning Board of Appeals of Revere,
JOHN J. VERRENGIA, as Member of the
Zoning Board of Appeals of Revere, and
JOSEPH FERRUZZI, as Building Inspector
of Revere

FINDINGS OF FACT, RULINGS OF LAW, AND JUDGEMENT

. . .

3. T&D Video has a constitutionally protected right to engage in the sale of non-obscene "adult" video tapes. T&D Video, Inc. v. City of Revere, 423 Mass. 577, 580 (1996). Counsel for both sides forcefully and ably presented at trial detailed arid focused evidence on the issue of the City's "intent" in enacting the Ordinances in

question — i.e. whether this court should view the Ordinances as patent prior restraint on speech or merely content-neutral time, place and manner regulation of adult entertainment. T&D Video asserts that the totality of the evidence demonstrates conclusively that Revere directed the ordinance specifically at T&D Video. The court concurs. Particularly, the enactment of the 1993 Ordinance, on September 16, 1993, two days after T&D sought a business certificate, evidences Revere's intention to single out T&D. See 754 Orange Ave., Inc. v. City of West Haven, 761 F.2d 105, 113 (2nd Cir. 1985). Because the 1993 Ordinance leaves no location available lawfully to conduct T&D Video's business, and the 1995 Ordinance has the same preclusive effect, the Ordinances — although concededly "content-neutral" [see, e.g., City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728 (2002)] -- collectively operate as impermissible prior restraint, leaving reasonable alternative avenues of communication of adult-based content unavailable, and not as a reasonable so-called "time, place, and manner restriction." See Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76 (1981). See also City of Los Angeles v. Alemeda Books Inc., supra, at 1737.

. . .

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK COUNTY **NO. 2005-P-0109**

T&D VIDEO, INC. D/B/A MOONLITE READER
Plaintiff-Appellee

v.

CITY OF REVERE, et al.,
Defendants-Appellants

ON APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT

Brief for the Defendants-Appellants City of Revere, et al.

For the Defendants-Appellants:

Ira H. Zaleznik, Esquire
Lawson & Weitzen, LLP
88 Black Falcon Avenue, Suite 345
Boston, MA 02210
(617) 439-4990

. . .

[33] Commission issued regulations that barred the newspaper company from selling papers from street coin operated newsracks. While noting that the newsracks were an efficient and cost-effective method of distributing the papers, the Court held that the regulation was constitutionally valid. Even though the regulation banned the street newsrack form of distribution in its entirety, there were ample other methods available to the paper to have its product distributed.

In this case, the facts are undisputed in the record that the same adult videos are readily available for sale, consistent with the provisions of the zoning ordinance, at numerous locations throughout Revere. In these circumstances., the requirement that there be reasonable alternative avenues of communication is satisfied, and the ordinance should not have been struck down by the Judge. Accordingly, this Court should reverse the judgment below, and direct the entry of a new judgment upholding the ordinance and dismissing this action.

III. THE TRIAL JUDGE FAILED TO APPLY APPROPRIATE LEGAL STANDARDS IN AWARDING LEGAL FEES AND COSTS TO T&D

A. T&D's Application Should Have Been Denied In Its Entirety Since It Reflected a Total Lack of Billing Judgment And Was Grossly Excessive

The Trial Judge, while noting the authority relied upon by Revere, concluded that the fee petition submitted **[34]** by T&D did not "shock the conscience" and should not be disallowed in full. App. 724. In reaching this conclusion, the Trial Judge abused the discretion granted to him in allowing a recovery of attorneys fees.

The fee petition of T&D, seeking almost one and a quarter million dollars, was outrageous in the extreme. In these circumstances, a Court is virtually compelled to deny all fees. As explained by the First Circuit Court of Appeals in *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st dr. 1991) approving of the Seventh Circuit's analysis in *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980):

> "On the other hand, there must come a point where what is sought is plainly improper. We therefore agree with that circuit's complete denial of fees in *Brown v. Stackler*, 612 F.2d 1057 (7th Cir.1980), even though there was a recovery. There the court said,
>
> > [A]ppellant's counsel submitted a claim which was so intolerably inflated that the District Court was warranted in departing from the usual practice and reacting vigorously to prevent such abuse of the court's authority to award reasonable compensation to counsel.
> >
> > If, as appellant argues, the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would **[35]** be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to

> what they should have asked for in the first place.
>
> 612 F.2d at 1059. This is strong medicine, but for this blow-up of a routine street arrest on a citizen's call, and inexcusable reaching for fees-to the burden of the court-we believe it entirely appropriate. A request for attorney's fees is required to be in good faith and in reasonable compliance with judicial pronouncements, and not an opening gambit in negotiations to reach an ultimate result. The statute give us discretion, 42 U.S.C. §1988, and the departure here was too extreme to be tolerated."

Most circuits, when confronted with an outrageous request, have followed the rule of the First Circuit in Lewis. For example, in *Scharn v. District Courts Trying Criminal Cases*, 148 F.3d 554 (5th dir. 1998), the Fifth Circuit, citing *Lewis* and *Brown*, denied all fees to a prevailing plaintiff when the fees sought were grossly disproportionate to a fair and reasonable fee. In *Scham*, counsel sought compensation for 936 hours of work at the rate of $350 per hour, or three times the average rate for practitioners with comparable experience in the area. The Court concluded that the District Court decision to deny all fees had to be affirmed. As the Fifth Circuit Court of Appeals stated, 148 F.3d 554, 559, quoting from **[36]** *Fair Housing Council of Greater Washington v. Landow*, 999 F.2d 92 (4th Cir. 1993):

> "We realize that the district court's remedy here is extreme, but we are reluctant to reverse inasmuch as doing so would serve to condone and encourage such outrageous petitions. As

> the Fourth Circuit has reasoned, appellants in this case intended to submit an outrageously excessive fee petition in the hope that the district court would at least award some, preferably high, percentage of the requested fees. We believe Congress did not intend to foster such gamesmanship when it enacted the Civil Rights Attorney's Fees Act of 1976. Rather, the clear intent of Congress was to provide reasonable fees to prevailing parties. Our decision today seeks to further that purpose by encouraging attorneys *at the outset to request only reasonable fees and to provide the necessary assistance to the district court for determining a reasonable fee.*" (Emphasis added).

Notwithstanding the admonition of the First, Fourth, Fifth and Seventh Circuits, T&D, in this case, submitted a grossly bloated, outrageously excessive request for fees and costs. T&D's fee petition ought to have suffered the same fate as the petitions in *Lewis*, *Scham*, *Landow* and *Brown*, and the Trial Judge should have denied the petition in its entirety.

The Supreme Court and the circuits have consistently held that the essence of any application for fees is the exercise of billing judgment, just as would be done in the private sector. The filing of a fee petition is not to be the opening bid in a gambit for fees. As the Supreme Court explained in *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983):

. . .

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APPENDIX J

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. **APPEALS COURT NO. 2005-P-109**
FAR NO.

T&D VIDEO, INC. D/B/A MOONLITE READER
Plaintiff-Appellee

v.

CITY OF REVERE, et al.,
Defendants-Appellants

ON APPEAL FROM JUDGMENTS
OF THE SUPERIOR COURT

Application of Defendants-Appellants City of Revere, et al., for Further Appellate Review

---

For the Defendants-Appellants:

Ira H. Zaleznik, Esquire
(BBO#538800)
Lawson & Weitzen, LLP
88 Black Falcon Avenue, Suite 345
Boston, MA 02210
(617) 439-4990

. . .

[10]

V. FURTHER APPELLATE REVIEW IS NECESSARY AND APPROPRIATE

Further appellate review is necessary and appropriate in this case since this matter involves important principles of constitutional law and public policy of broad application. The decision of the Appeals Court, if undisturbed, will result in the requirement that all cities and towns in the Commonwealth make provision for adult uses, regardless of the character of the community and the availability of such entertainment elsewhere. With respect to the fee petition, the decision of the Appeals Court will eviscerate the rule of *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991) and ensure that no fee petition, no matter how outrageous or disorganized, will be subject to denial. The effect of this decision, if not reviewed by this Court, will do lasting harm to constitutional principles and civil rights litigation throughout the Commonwealth.

As set forth above, the Trial Judge's conclusion, endorsed by the Appeals Court, that there was no area in Revere that T&D could locate, was erroneous. However, even if one were to conclude that this finding was correct, the ordinance would nonetheless be constitutional. The undisputed evidence in the record shows that the adult videos like the ones sold by T&D were readily available at conventional video store . . .

[14]

. . . with the provisions of the zoning ordinance, at numerous locations throughout Revere. In these circumstances, the requirement that there be reasonable alternative avenues of communication is satisfied, and the ordinance should not have been

struck down by the Appeals Court and the Trial Judge. Accordingly, this Court should grant further appellate review, reverse the judgment below, and direct the entry of a new judgment upholding the ordinance and dismissing this action.

Finally, as to the Appeals Court's disposition of the judgment for attorneys fees and costs, Revere would suggest that the conscience of the Appeals Court needs sharpening. The Appeals Court decision noted that "this fee request certainly approaches the outermost parameter that separates an acceptable application from one that 'shocks the conscience.'" See 66 Mass.App.Ct. at 476. Revere respectfully suggests that the fee petition did not merely "approach" the "outermost parameter," but clearly crossed the line. T&D sought compensation for over four thousand hours of legal time. The amount of compensation sought approached one and one quarter million dollars. To attempt to shift this burden to the taxpayers of Revere is unconscionable, and should not be permitted in any amount.

This rule is the prevailing one in the circuits. As explained by the First Circuit Court of Appeals in *Lewis* **[15]** *v. Kendrick*, 944 F.2d 949, 958 (1st dir. [*sic*] 1991) approving of the Seventh Circuit's analysis in *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th dir. [*sic*] 1980)

> "On the other hand, there must come a point where what is sought is plainly improper. We therefore agree with that circuit's complete denial of fees in *Brown v. Stackler*, 612 F.2d 1057 (7th Cir.1980), even though there was a recovery. There the court said,
>
> > [A]ppellant's counsel submitted a claim which

> was so intolerably inflated that the District Court was warranted in departing from the usual practice and reacting vigorously to prevent such abuse of the court's authority to award reasonable compensation to counsel.
>
> If, as appellant argues, the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place.

612 F.2d at 1059. This is strong medicine, but for this blow-up of a routine street arrest on a citizen's call, and inexcusable reaching for fees-to the burden of the court-we believe it entirely appropriate. A request for attorney's fees is required to be in good faith and in reasonable compliance with judicial pronouncements, and not an opening gambit in negotiations to reach an ultimate result. The statute give us discretion, 42 U.S.C. §1988, and the departure here was too extreme to be tolerated."

Most circuits, when confronted with an outrageous request, have followed the rule of the First Circuit in **[16]** Lewis. For example, in *Scham v. District Courts Trying Criminal Cases*, 148 F.3d 554 (5th dir. 1998), the Fifth Circuit, citing *Lewis* and *Brown*, denied all fees to a prevailing plaintiff when the fees sought were grossly disproportionate to a fair and reasonable fee. In *Scham*, counsel sought compensation for 936 hours of work at the rate of $350 per hour, or three times the average rate for practitioners with comparable experience in the area. The Court concluded that the District Court decision to deny all fees had to be affirmed. As the Fifth Circuit Court of Appeals stated, 148 F.3d 554, 559, quoting from *Fair Housing Council of Greater Washington v. Landow*, 999 F.2d 92 (4th Cir. 1993)

> "We realize that the district court's remedy here is extreme, but we are reluctant to reverse inasmuch as doing so would serve to condone and encourage such outrageous petitions. As the Fourth Circuit has reasoned, appellants in this case intended to submit an outrageously excessive fee petition in the hope that the district court would at least award some, preferably high, percentage of the requested fees. We believe Congress did not intend to foster such gamesmanship when it enacted the Civil Rights Attorney's Fees Act of 1976. Rather, the clear intent of Congress was to provide reasonable fees to prevailing parties. Our decision today seeks to further that purpose by encouraging attorneys *at the outset to request only reasonable fees and to provide the necessary assistance to the district court for determining a reasonable fee.*" (Emphasis added).

Notwithstanding the admonition of the First, Fourth, Fifth and Seventh Circuits, T&D, in this case, submitted a grossly bloated, outrageously excessive request for **[17]** fees and costs. T&D's fee petition ought to have suffered the same fate as the petitions in *Lewis*, *Scham*, *Landow* and *Brown*, and the Appeals Court and the Trial Judge should have denied the petition in its entirety.

The Appeals Court recognized these principles but failed to give them effect by simply vacating the fee award and remanding the matter to the Superior Court for a recalculation of the award. This Court should correct the error, vacate the award, and direct the entry of a new judgment denying T&D all fees.

VI. CONCLUSION

For all of the foregoing reasons, Defendants-Appellants City of Revere, et al., respectfully request this Honorable Court to grant this application for further appellate review.

Respectfully submitted,

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